Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

(3)

No. 94-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

v.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITIONER'S SUPPLEMENTAL BRIEF

JOSEPH AVIV
Counsel of Record
BRUCE L. SEGAL
MIRO MIRO & WEINER
a professional corporation
Suite 100
500 North Woodward Avenue
P.O. Box 908
Bloomfield Hills, Michigan
48303-0908
Telephone: (810) 258-1207
Counsel for Petitioner

Of Counsel:
RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

BEST AVAILABLE COPY

60P

PETITIONER'S SUPPLEMENTAL BRIEF

The petitioner files this supplemental brief under Sup. Ct. R. 15.7 to call the Court's attention to the opinion of the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625 (U.S. June 19, 1995) (No. 94-749), published after the filing of the petition for a writ of certiorari. [1] In *Hurley,* the issue was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 4626. The unanimous Court held that "such a mandate violates the First Amendment." *Ibid.* The Court ruled that the state courts' application of the public accommodations statute (Mass. Gen. Laws §272:98) produced an order essentially requiring the private organizers to alter the expressive content of their parade. *Id.* at 4630. This use of the state's power violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.* A person has the right to "decide 'what not to say,'" *ibid.* (quoting *Pacific Gas & Elect. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)), and may remain silent on expressions of opinions or on statements of fact he "would rather avoid." *Ibid.* (citations omitted). The essential relevance of *Hurley* to the present case, then, is this point: whatever the reason, a person has the choice not to propound a particular point of view, and that choice lies "beyond the government's power to control." *Ibid.*

In the present case, the Supreme Court of New Jersey violated this fundamental rule of First Amendment protection: by judicial fiat, it dictated a particular "anti-Iraq war" message on

[1] The petition for a writ of certiorari was docketed on May 23, 1995, as No. 94-1925. The respondents' brief in opposition was due on June 22, 1995. By letter dated June 12, 1995, counsel for the respondents requested of the Chief Deputy Clerk an enlargement of the time to file the opposing brief "[s]ince this case includes an issue related to one involved in Hurley v. Irish American Gays, 94-749, which was argued on April 25 and has not yet been decided." The application to extend time was granted by the Clerk; the time was extended to July 20, 1995.

private property owned by one who disagreed with and opposed the proffered viewpoint. The state supreme court's justification was that "private property owners who have so transformed the life of society for their profit . . . must be held to have relinquished a part of *their* right of free speech." *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 371, 650 A.2d 757, 780 (1994) (4-3 decision).[2] This justification cannot survive this Court's holding in *Hurley*. The owner of The Mall at Short Hills, by its presentation, selection of tenants, and advertising, is engaged in conscious expressive activity that defines the mall to its potential customers and indeed to the world at large. The fact that The Mall at Short Hills is successful and is open to the public is no more dispositive than that the St. Patrick's Day Parade takes place on the public streets of South Boston, including as many as 20,000 marchers and drawing up to 1 million watchers, *see Hurley*, 63 U.S.L.W. at 4626; moreover, in this case, there is no showing comparable to the one made in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. ____, 114 S.Ct. 2445 (1994), that the speakers will be destroyed in the absence of the challenged law. After all, the respondents here managed to hand out over 85,000 leaflets in places other than shopping centers during the two weeks preceding their application for a temporary restraining order. App. to Pet. for Cert. 142a, ¶8. Nor does the private owner lose First Amendment protection by holding a variety of events, such as concert performances (each of

[2]This justification was based on the majority's *judicial notice* of the "fact" that shopping centers have "displaced the downtown business districts" of New Jersey. *See New Jersey Coalition*, 138 N.J. at 346-47, 650 A.2d at 767-68. But this Court in *Hurley* reiterated that, when it is confronted with the state court's conclusion that the factual characteristics of the petitioner's activity place it outside of First Amendment protection, the Court has "a constitutional duty" to conduct an independent examination of the record as a whole, without deference to the state court, to assure that this judgment does not constitute a forbidden intrusion on the field of free expression. *Hurley*, 63 U.S.L.W. at 4628 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). The record in the present case, developed during 11 days of trial testimony and by stipulations of fact, shows, in fact, that shopping malls have not become the new downtowns of New Jersey, and that activists have better opportunities for leafleting today than ever before.

which is designed to draw targeted customers into the mall). A person does not forfeit constitutional protection simply by "combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley,* 63 U.S.L.W. at 4629. The protection *Hurley* afforded the parade organizers was not contingent on their having a coherent view to present to the rest of the world. It was enough that they had certain preferences about who should be included and who excluded.

Indeed, the petitioner's decision to exclude all political expression from its property is itself expressive activity that projects a more pointed message than any which the parade organizers wished to express. The apolitical ambiance of the petitioner's mall is evident from the moment one enters the door. It certainly would be odd if the petitioner could acquire First Amendment protection by posting a sign that says that it supports the United States' involvement in the Iraq war, but is treated as possessing no First Amendment right when it utters no words as to its views.

The First Amendment right to remain silent presented in this case, then, is governed by *Hurley.* To be sure, *Hurley* distinguishes *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), but the grounds of distinction either do not apply to the present case or are otherwise unconvincing. First, as stated before, the fact that the owner of the PruneYard Shopping Center was running a business establishment that was open to the public is no more dispositive than that the organizers were running a parade along the public streets of Boston.[3] And the benefit of the right to exclude unwanted speech is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression." *Hurley,* 63 U.S.L.W. at 4630.

Second, the distinction that the solicitations in *PruneYard* were " 'not likely [to] be identified with those of the owner,' " *id.* at 4632 (quoting *PruneYard,* 447 U.S. at 87), is refuted with

[3]Unlike the PruneYard Shopping Center, an open-air mall, The Mall at Short Hills is a wholly-enclosed shopping center.

respect to The Mall at Short Hills by the market research conducted by The Gallup Organization and introduced into evidence. This research showed that the respondents' message, in fact, will be associated with the mall enterprise and will affect the behavior of customers who shop at the mall.

Third, the further distinction that a mall owner may " 'expressly disavow any connection with the message by simply posting signs,' " *ibid.* (quoting *PruneYard,* 447 U.S. at 87), is a distinction without a difference in this case, as the record shows.[4] The individual shops in The Mall at Short Hills are chosen, designed, and operated (as are the individual segments of a parade) to contribute to the expression of a common theme and message; the message to the mall's targeted clientele is: you may shop in this very calm, very serene, luxurious atmosphere without hassle, disruption, or controversy. Accordingly, as with a parade, "there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants." *Id.* at 4631. The Mall at Short Hills is not just some haphazard collection of unrelated shops. The owner selects each tenant from potential tenants to comport with the overall theme and high-fashion image of the mall. Even placement within the mall is carefully choreographed to provide a cohesive presentation and message to the customers, one of tranquility and refinement.[5] In this context, the owner has made a deliberate decision about the types of speech that it will admit on its private property, and inclusion of a contentious speaker, even with disavowal of his viewpoint, is hardly "practicable."

The final distinction of *PruneYard,* that, there, " 'the owner did not even allege that he objected to the content of the pamphlets,' " *ibid.* (quoting *Pacific Gas & Elect.,* 475 U.S. at 12),

[4]The record that came to this Court in *PruneYard,* on the other hand, was very limited because the trial court had granted summary judgment.

[5]Of course, like the mall owner's posting of signs, the parade organizer may include in the parade a marcher with a disclaimer sign preceding or following the offending parade unit. But such a disclaimer would be equally curious in the elegant Mall at Short Hills as it would be in a parade.

is simply inapplicable here. In the present case, it is an undisputed fact that the owner of The Mall at Short Hills disagreed with the respondents' political message. App. to Pet. for Cert. 143a ¶15. If a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members, *see Hurley*, 63 U.S.L.W. at 4632 (explaining *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988)), and if a parade organizer may now exclude people marching on the public streets from displaying a message not wanted by the organizer, why must a shopping center owner who chooses to remain silent on controversial and confrontational issues be required to furnish a valuable portion of its private property to a political action group to espouse a cause expressly opposed by the owner?

For these reasons, we respectfully suggest that, as an alternative to granting the petition and hearing this case on the merits at this time (the petitioner's preferred alternative), the Court should grant the petition for a writ of certiorari, vacate the judgment of the Supreme Court of New Jersey, and remand the case to that court for reconsideration in light of this Court's intervening ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. That intervening decision has shed new light on First Amendment law which, if it had been available at the time of the state supreme court's decision, might have led to a different result.

Respectfully submitted,

JOSEPH AVIV
Counsel of Record
BRUCE L. SEGAL
MIRO MIRO & WEINER
a professional corporation
Suite 100
500 North Woodward Avenue
P.O. Box 908
Bloomfield Hills, Michigan
48303-0908
Telephone: (810) 258-1207
Counsel for Petitioner

Of Counsel:
RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, Illinois 60637